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DECISIONS OF THE DEPARTMENT OF THE INTERIOR

APPEALS OF JOHN F. THEIN, KENNETH E. SCHOONOVER, WENDELL SKAFLESTAD AND KOLBJORN SKAFLESTAD

4 ANCAB 116

Decided *January 11, 1980*

Decision of the Bureau of Land Management AA-6980-A.

Affirmed.

1. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

Where Forest Service permits were terminated for apparent cause (failure to comply with permit conditions), the original holders of the permits no longer have property interests which constitute valid existing rights protected by § 14(g) of ANCSA.

2. Alaska Native Claims Settlement Act: Conveyances: Valid Existing Rights: Third-Party Interests

Where the holder of a Forest Service permit requested that his special use permit be canceled and the Forest Service did so and, subsequently, issued a special use permit for the same lot to another person, the original holder of the permit no longer has a property interest or a valid existing right derived from the permit which is protected under § 14(g) of ANCSA.

3. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Standing

If the only interest in land claimed by appellants affected by the decision appealed was a terminated or relinquished special use permit, the appellants will be found to lack a property interest in land sufficient to confer standing under regulations in 43 CFR 4.902.

4. Alaska Native Claims Settlement Act: Alaska Native Claims Appeal Board: Appeals: Jurisdiction

There is no administrative appeal process available to claimants under § 14(c) of ANCSA, and such claims must be brought in a judicial forum.

APPEARANCES: James A. Calvin, for Forest Service, U.S. Department of Agriculture; Fred J. Baxter, Esq., for Huna Totem Corp.; Dennis J. Hopewell, Esq., Office of the Regional Solicitor, for the Bureau of Land Management. The following parties appeared pro se: John F. Thein; Kenneth E. Schoonover, Wendell Skaflestad, Kolbjorn Skaflestad.

OPINION BY ALASKA NATIVE CLAIMS APPEAL BOARD

SUMMARY OF APPEAL

Appellants claim property interests through terminated or relinquished U.S.D.I. Forest Service special use permits in land approved for conveyance to Huna Totem Corp. pursuant to § 14(b) of ANCSA. The Board rejects the appellants' claims and affirms the Bureau of Land Management's decision to issue conveyance since terminated or relinquished special use permits do not constitute valid existing rights and do not receive protection under § 14(g) of ANCSA.

JURISDICTION

The Alaska Native Claims Appeal Board, pursuant to delegation of authority to administer the Alaska Native Claims Settlement Act, 85 Stat. 688, *as amended*, 43 U.S.C. §§ 1601–1628 (1976 and Supp. I 1977), and the implementing regulations in 43 CFR Part 2650 and 43 CFR Part 4, Subpart J, hereby makes the following findings, conclusions and decision.

PROCEDURAL BACKGROUND

On June 27, 1979, the Bureau of Land Management (BLM) issued a decision to issue conveyance AA–6980–A which approved for conveyance to Huna Totem Corp., pursuant to § 14(b) of ANCSA, certain lands applied for on Dec. 12, 1974.

On July 18, 1979, John F. Thein filed a Notice of Appeal from the above-mentioned BLM decision and subsequently three similar Notices of Appeal were filed on July 24, 1979, by Kenneth Schoonover, Wendell Skaflestad, and Kolbjorn Skaflestad. These four appellants claim a property interest in lands affected by the BLM decision through special use permits issued by the Forest Service, United States Department of Agriculture (hereafter Forest Service). Four resident lots are located in an area designated the Gartina-Game Creek Residence Group, Hoonah, Alaska, and one lot located in the Neck Point Residence Group, Spasski Bay.

Since all appellants claim their property interests by virtue of special use permits issued by the Forest Service under authority of the Act of June 4, 1897 (30 Stat. 35; 16 U.S.C. § 551 (1967)), the Board issued an order on July 27, 1979, naming the Forest Service a necessary party to this appeal. The Forest Service responded to this order on Aug. 9, 1979.

BLM, on Aug. 1, 1979, filed a motion to consolidate the four appeals since letters filed by the appellants relate to the same area and all appeals concern possible rights gained from Forest Service special use permits. On Aug. 10, 1979, ANCAB consolidated the separate

appeals (Thein, ANCAB VLS 79–29; Schoonover, ANCAB VLS 79–30; W. Skaflestad, ANCAB VLS 79–31; K. Skaflestad, ANCAB VLS 79–32) and assigned the consolidated appeal number ANCAB VLS 79–32 (Consolidated).

On Oct. 11, 1979, the BLM filed its Answer in response to appellants' notices of appeal.

FACTUAL BACKGROUND

NECK POINT RESIDENCE GROUP—SPASSKI BAY

The Forest Service issued a special use permit to Mr. Kenneth E. Schoonover which appears to have been in effect on 9/1/60, for Lot 2, Neck Point group of residences, Spasski Bay. On Mar. 30, 1970, Mr. Schoonover filed with the Forest Service a relinquishment thereby giving up all rights, title and interests to his improvements covered by a special use permit and concurrently requested cancellation of the permit. The Forest Service issued a special use permit to Charles Johnson on Sept. 3, 1971, for "Lot 2, Neck Point group of residence, Spasski Bay (formerly under permit to Kenneth E. Schoonover, 9/1/60)." Mr. Johnson's permit was terminated for nonpayment of fees (letter from Clyde A. B. Ferguson, Acting Program Manager Recreation Lands, to Jim Calvin, Regional Office, Lands, U.S. Forest Service, Subject: Lot 2 Spasski (Neck Point)—Kenneth Schoonover, Nov. 27, 1979.)

GARTINA-GAME CREEK RESIDENT GROUP, HOONAH, ALASKA

The Forest Service issued special use permits to the following individuals for residential lots at Gartina-Game Creek Residence Group, Hoonah, Alaska:

Name	Lot No.	Date of Issue
John F. Thein	20	10/15/70
Kenneth Schoonover	13	9/14/70
Wendell Skaflestad	22	6/16/71
Kolbjorn A. Skaflestad	21	11/9/70

On Sept. 11, 1973, the Forest Service examined the lots and reported that none of the four permit holders had met the construction time schedule which was a condition of the permits. The examiner recommended termination of permit if acceptable justification was not received. By certified letter dated Sept. 13, 1973, the Forest Service notified each permit holder of the site visit and cited provisions in the permit for construction. The permit holders were given until Oct. 15, 1973, to "show just cause why construction has not been accomplished as agreed upon in your permit." Each permit holder responded indicating some land clearing but no construction. In July 1974, the Regional Forester sent identical letters to the four permit holders explaining that Gartina-Game Creek residence tract lies entirely within the Huna Totem Village Corp. selection area under ANCSA. The permit holders were further informed

that "[t]he Settlement Act provides that selected lands are subject to valid existing rights." In closing, the Regional Forester states: "Because you have not completed construction, and in light of the situation as we have described it, we now believe that your permit should be closed. We will delay our final decision on this until September 1, 1974 to provide opportunity for you to express your thoughts."

The Regional Forester, by certified letter to each permit holder, terminated the permits for all four appellants on the dates shown:

John Thein	October 25, 1974.
Kenneth Schoonover	November 8, 1974.
Wendell Skaflestad	December 20, 1974.
Kolbjorn Skaflestad	November 11, 1974.

CONTENTIONS OF PARTIES

Appellant, Mr. John F. Thein, by letter to ANCAB on July 16, 1979, asserts a vested interest in Lot 2 of the Gartina-Game Creek Residence Group, Hoonah, Alaska, through a terminated special use permit from the Forest Service, commencing Sept. 1, 1970. Mr. Thein states he "made some improvements to the lot with the intention of building a residence on the lot as was the purpose of the permit. Due to the inaccessibility of the lot, it wasn't feasible to build a permanent family residence at that time." According to Mr. Thein's letter, lot holders were told by a representative of the Forest Service that "the lots were eventually to be transferred to the State of Alaska" and that when the transfer took place, the lot holders would "have the option of purchasing the lots at raw land value." Mr. Thein further states that "[f]or the above reasons, I believe I should be entitled to the option of purchasing the lot I held."

Appellant, Mr. Kenneth E. Schoonover, by letter to BLM on July 6, 1979, asserts a third-party interest under ANCSA in two different lots within the Huna Totem Corporation selection area. In 1970, Mr. Schoonover acquired use of Lot 13, Gartina-Game Creek Residence Group land. Mr. Schoonover also had acquired use of Lot 2, Neck Point Residence Group at Spasski Bay. Since he could not occupy two residence group lots at the same time, he turned over his hunting cabin at Spasski Bay to Charles Johnson and requested cancellation of his special use permit for Lot 2. In his July 6 letter Mr. Schoonover states:

> We would be satisfied with just a first-preference rights status if this land should become available for sale, if it is impossible for us to acquire the lots outright through your office in accordance to the steps set forth in the Alaska Native Claims Settlement Act.
>
> The foregoing being my claim on the lot in the Neck Point Residence Group and the Gartina-Game Creek Residence Group I hereby file my appeal and ask to be conveyed the two lots. If this be impossible, I agree to be conveyed the lot in Spasski Bay and I agree also to be placed on a first-preference status to acquire the

Gartina-Game Creek lot from the Se-Alaska or Huna Totem corporations at a later date should they acquire it and agree to sell it.

Appellant, Kolbjorn Skaflestad, in a letter to ANCAB on July 17, 1979, feels that he should have "first priority to purchasing" Lot 21, U.S. Survey 2414 (Gartina-Game Creek Residence Group land).

Appellant, Wendell Skaflestad, in a letter to BLM on July 9, 1979, states that on June 12, 1971, he "signed a contract with the U.S. Forest Service for Lot 22, Gartina-Game Creek Residence Group, Hoonah, Alaska." Mr. W. Skaflestad alludes to having valid existing rights to acquiring land in the Residence Group. In a letter to ANCAB on July 25, 1979, Mr. W. Skaflestad closes with the following: "I appeal the decision and would like a commitment from you that I will have the opportunity to purchase and hold title to my lot."

The Regional Forester, Forest Service, in response to ANCAB order joining the Forest Service as a party to the appellants' appeals states:

The permits once held by the appellants were cancelled for non-compliance with the terms of the permits, and they no longer have any valid interests in the area. That being the case, we would not agree that the appellants have any rights pursuant to Sec. 14(g) of ANCSA.

Letter, USDA Forest Service to Honorable Judith M. Brady, ANCAB, Aug. 9, 1979.

DECISION

All appellants claim property interests in Gartina-Game Creek Residence Group tract through Forest Service special use permits terminated for failure to construct within the time limits set in the conditions of the permit. One applicant claims property interest in Neck Point Residence Group, Spasski Bay, through a permit relinquished and subsequently issued to another person.

BLM argues that the facts in this appeal "[b]rings this appeal squarely within the decision set forth by this Board [ANCAB] in *Appeal of Kodiak Island Setnetters Ass'n*, 85 I.D. 200 (3 ANCAB 1, VLS 77-15; 1978)." In *Kodiak* each of the appellants alleged that they had been the holders of special use permits which entitled them to use certain described lands.

The Board held that:

Sec. 14(g) protects existing permits as valid existing rights and provides that patent is to be subject to the right of the permittee to the complete enjoyment of all rights, privileges, and benefits granted to him. Once a permit expires, however, it is not an existing right and is not protected by § 14(g).

Documents filed with the Board by the Forest Service show that the permits for lots in the Gartina-Game Creek Residence Group tract were terminated for failure to comply with construction provisions of the permit.

[1] Since the permits were terminated for apparent cause, prior to

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the expiration date of Dec. 31, 1980, this Board finds that appellants as original holders of the permits no longer have property interests which constitute valid existing rights and are protected by § 14(g) of ANCSA.

[2] The Board finds that, with regard to Lot 2, Neck Point Residence Group tract, the appellant, Mr. Schoonover, relinquished all property rights when he requested on Mar. 30, 1970, that his special use permit for Lot 2, Neck Point Residence Group be canceled and a permit for the same lot was subsequently issued to Mr. Charles Johnson. Where the holder of a Forest Service permit requested that his special use permit be canceled and the Forest Service did so and, subsequently, issued a special use permit for the same lot to another person, the original holder of the permit no longer has a property interest or a valid existing right derived from the permit which is protected as under § 14(g) of ANCSA.

[3] It should be noted that if the only interest in land claimed by appellants affected by the decision appealed were a terminated or relinquished special use permit, the appellants would be found to lack a property interest in land sufficient to confer standing under regulations in 43 CFR 4.902. However, BLM contends that if the appellants have any claim to the land it would have to be a claim against the village corporation pursuant to § 14(c)(1) of ANCSA.

The appellants assert that they should be given priority, or first-preference rights to purchase the Gartina-Game Creek Residence Group lots for which they once held special use permits.

Sec. 14(c)(1) provides as follows:

> (c) Each patent issued pursuant to subsections (a) and (b) shall be subject to the requirements of this subsection. Upon receipt of a patent or patents:
>
> (1) the Village Corporation shall first convey to any Native or non-Native occupant, without consideration, title to the surface estate in the tract occupied as a primary place of residence, or as a primary place of business, or as a subsistence campsite, or as headquarters for reindeer husbandry;

[4] The Board held in *Appeal of James W. Lee* that:

> [W]hile an appeal based on a claimed interest created by § 14(c) of ANCSA, *supra*, is premature if filed before issuance of interim conveyance, the Board lacks jurisdiction to decide such an appeal filed after interim conveyance has issued. The result is that there is no administrative appeal process available to claimants under § 14(c), and such claims must be brought in a judicial forum.

Appeal of James W. Lee, 3 ANCAB 334, 343 (1979) [ANCAB VLS 79-11].

This decision in no way affects whatever right appellants may have to use and occupy the land, and to receive title to the land, pursuant to § 14(c)(1). The Board does not decide the question of whether appellants are entitled to a conveyance pursuant to § 14(c), or any question as to what they must receive if it is determined that they have rights under § 14(c).

Based on the above findings and conclusions, this Board here Orders that the Decision of the Bureau of Land Management AA-6980-A is hereby affirmed.

This represents a unanimous decision of the Board.

JUDITH M. BRADY
Administrative Judge

ABIGAIL F. DUNNING
Administrative Judge

JOSEPH A. BALDWIN
Administrative Judge

APPEAL OF RECON SYSTEMS, INC.

IBCA-1214-9-78

Decided *January 17, 1980*

Contract No. 68-03-0293, Environmental Protection Agency.

Principal decision affirmed on Motion for Reconsideration

1. Rules of Practice: Appeals: Motions—Rules of Practice: Appeals: Reconsideration—Rules of Practice: Appeals: Statement of Reasons

The Government's motion for reconsideration, which contends that the current version of the Limitation of Cost clause does not entitle a contractor to additional funding for a change unless the contracting officer specifically increases the estimated cost, provides no basis for overturning the Board's principal decision allowing excess costs attributable to a construction change, where the contracting officer was given advance notice that the estimated costs would be exceeded and took no action to advise the contractor that no funding would be provided or to stop the project officer from asking for continued performance of the changed work.

APPEARANCES: Norman J. Weinstein, President, Recon Systems, Inc., Somerville, New Jersey, for appellant; Richard V. Anderson, Government Counsel, Cincinnati, Ohio, for the Government.

OPINION BY ADMINISTRATIVE JUDGE LYNCH

INTERIOR BOARD OF CONTRACT APPEALS

The Government requests reconsideration of the Board's decision of Sept. 25, 1979, which awarded partial costs of work required to be performed after expiration of the contract.

The Government argues that changes which had earlier been held to be outside the Limitation of Cost clause (LOCC), are now specifically included by specific language of the clause, that the contractor gave only a belated notice that the estimated costs would be exceeded, and that the contractor was a volunteer in completing the work without reliance on the expectation that additional funding would be provided.

The LOCC in the contract contains the following paragraph: "(d) Change orders issued pursuant to the 'Changes' clause of this contract shall not be considered an authorization to the Contractor to exceed the estimated cost set forth in the

Schedule in the absence of a statement in the Change order, or other contract modification, increasing the estimated cost." We accept the Government's contention that this specific language was included in the LOCC in order to make the cost limitation applicable to changes, and thereby avoid the effect of earlier Board findings to the contrary under the older clause. *Booz, Allen & Hamilton, Inc.*, IBCA–1027–3–74 (Mar. 24, 1976), 83 I.D. 95, 76–1 BCA par. 11,787, is cited to show this Board's recognition of the alteration of the rule. It should be noted that in that case, there was no notice given that the estimated cost would be exceeded and that the record there would not support a finding that the Government knew or should have known that costs would exceed the ceiling by reason of the added work of repairing Government property. *Booz, Allen & Hamilton, Inc., supra*, rejected appellant's argument that the new LOCC clause was inapplicable to constructive change orders, where the claim was based on repairs to Government property with the knowledge and acquiescence of the Government, but without knowledge of the impending overrun. However, in finding that the Government had not waived its discretion to fund the overrun, the Board stated: "This is so because absent unforeseeability or impossibility (n. 18, *supra*), the cases finding the Government obligated to fund an overrun are dependent upon actions of responsible Government officials, *e.g.*, urging continued performance or demanding and accepting the benefits of performance, with knowledge of the overrun." (Footnote omitted.) In the instant case, we found that the contracting officer received advance written notice of the exhaustion of the contract funds by reason of the appellant's letter of Oct. 10, 1975, at which time no funds were being expended under the contract. Subsequently, by letter dated Oct. 22, 1975, the project officer requested appellant to incorporate the corrections and changes resulting from a greatly expanded Government review team. The work was completed by Jan. 23, 1976, and returned to the Government. The Government accepted the completed work with full knowledge of the fact that all the requested work took place after notice that no contract funds were available.

With respect to the Government's contention that appellant was a volunteer in completing the work without expectation that additional funding would be provided, we note that finding agreements to volunteer, donate or cost share contract expenses are the exception rather than the rule, since there must be a clear indication of the intent of the contractor to forego payment for services required under a contract. Appellant's letter of Oct. 10, 1975, advising of the overrun suggests no such intention. The letter advises that the overhead rate exceeds the maximum allowable rate of the contract and states: "We therefore will claim 100% overhead rate, resulting

in an overrun on this contract." An earlier letter from appellant dated Aug. 13, 1975, advised a contract specialist on the staff of the contracting officer that the contract was not ready to be closed out because of the work remaining to be done after Government review comments on the draft report were received.

Despite the knowledge that funds were exhausted and that the work was not complete, the contracting officer did not respond to appellant's requests for funding the additional work for over 2 years. On Dec. 2, 1977, the contracting officer's letter indicated that: "Our program personnel advised us that there are no funds available to cover the cost overrun." The project officer was first asked about the availability of funds by a letter dated Nov. 16, 1977, from a contract specialist. The contracting officer failed to make a timely determination of the availability of funds and to advise the appellant accordingly, but rather allowed the final tasks under the contract to be sent to the contractor and the Government to accept and use the end product. The actions of the contracting officer were consistent with an intent to fund the additional work under the contract; and, only after learning that funds were not available 2 years after the added work was required did the Government raise the technical defense that the LOCC did not obligate the Government to provide the additional funding. The question of whether the additional funds to complete the contract would have been made available upon timely actions of the contracting officer is now moot. Failure to act resulted in the project officer ordering the added work and the acceptance by the Government of the benefits of the added work. In these circumstances, we confirm our finding that the Government must pay for the costs of the constructive change which resulted in costs over the contract ceiling being incurred after notice that the contract funds were fully expended.

Conclusion

The Board's principal decision of Sept. 25, 1979, is hereby reconfirmed.

RUSSELL C. LYNCH
Administrative Judge.

I concur:

WILLIAM F. MCGRAW
Chief Administrative Judge

EASTOVER MINING CO.

2 IBSMA 5

Decided *January 21, 1980*

Petition for discretionary review, filed by Eastover Mining Company, of a July 16, 1979, decision by Administrative Law Judge William J. Truswell upholding Notice of Violation No. 79–II–4–3 issued by the Office of Surface Mining Reclamation and Enforcement in accordance with the Surface Mining

Control and Reclamation Act of 1977 and ordering payment of a civil penalty (Docket No. NX 9-23-P).

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures—Surface Mining Control and Reclamation Act of 1977: Notices of Violation.

The Office of Surface Mining Reclamation and Enforcement is authorized to issue a notice of violation for noncomp'iance with the initial regulatory program even if a state has already initiated enforcement action for the same violation.

APPEARANCES: Charles P. Gault, Esq., Office of the Field Solicitor (Knoxville), Walton D. Morris, Jr., Esq., and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement; Karl S. Forester, Esq., Harlan, Kentucky, for Eastover Mining Company.

OPINION BY THE INTERIOR BOARD OF SURFACE MINING AND RECLAMATION APPEALS

In this case we rely on the recitation of the procedural history and factual background provided in Administrative Law Judge (ALJ) Truswell's July 16, 1979, decision.[1]

We granted Eastover's petition for discretionary review from that decision to consider its objection to dual enforcement action by the Office of Surface Mining Reclamation and Enforcement (OSM) and the Commonwealth of Kentucky.[2]

[1] The "Background" and "Facts" portions of the ALJ's decision read in part as follows:

"In accordance with section 525 of the Surface Mining Control and Reclamation Act of 1977 (the Act), Eastover Mining Co. (applicant) applied on April 16, 1979, for review of the notice issued by the Office of Surface Mining Reclamation and Enforcement (respondent) under section 521(a)(3) of the Act. Subsequently, on May 7, 1979, under section 518 of said Act applicant applied for review of a proposed civil penalty assessment issued by respondent. Contemporaneous with the filing of this application, applicant, in accordance with the requirements of 43 CFR 4.1152(b)(1), paid the full amount of the proposed penalty ($5,800) to the Assessment Office, Office of Surface Mining to be placed in an escrow account pending a final determination of the proposed assessment. A hearing was held before the undersigned in Harlan, Kentucky, on June 7, 1979 at which time both cases were consolidated for hearing and decision.

"Notice of Violation No. 79-II-4-3 was issued on March 30, 1979, by the Office of Surface Mining for Eastover Mining Company's Arjay Mine in Bell County, Kentucky. This is an underground mine and its state permit number is 207-5008. Said notice alleged that Eastover Mining Company had violated the provisions of 30 CFR 717.14(e) and 717.17. Three separate violations were included in Notice of Violation No. 79-II-4-3. Violation No. 1 was failure to pass all drainage from the disturbed area through a sedimentation pond or series of sedimentation ponds. Violation No. 2 was discharge from the disturbed area fails to meet effluent limitations. Iron greater than 10 mg/1, PH less than 6.0. Violation No. 3 was failure to cover waste material from underground mine (which are deposited on land surface) with a minimum of four feet of nontoxic, noncombustible material, failure to revegetate. The time for abatement for all three violations was 8:00 a.m., May 4, 1979.

"Respondent issued to applicant a Notice of Proposed Assessment of a civil penalty of $2,000 for Violation No. 1, $1,800 for Violation No. 2, and $2,000 for Violation No. 3, a total of $5,800 for the three."
Decision at 1-2.

[2] In its petition Eastover also stated its belief that the Administrative Law Judge erred in holding that sec. 521(a)(1) of the Act has no effect during the enforcement of the interim regulatory program. Since the Board had previously held contrary to Eastover's position in *Dayton Mining Co., Inc.*, 1 IBSMA 125, 86 I.D. 241 (1979), the Board's order granting the petition precluded review of that issue.

Eastover does not contend that the ALJ's decision upholding these violations is in error. Rather it asks to be relieved of responding to potentially different requirements prescribed by state and Federal enforcement agencies for the same or similar problems. Kentucky, it points out, had already issued enforcement documents requiring remedial measures to be taken with respect to the same conditions at its mine.

[1] It is not clear from the record that Eastover was in fact subjected to conflicting obligations. In any event, what is clear is that an OSM inspector is authorized to issue a notice of violation when he discovers noncompliance with the regulations. 30 CFR 722.12(a) provides that "[i]f an authorized representative of the Secretary finds a violation which is not covered by section 722.11 of this Part, [he] shall issue a notice of violation fixing a reasonable time for abatement." Judge Truswell held that this regulation disposes of the question.[3] We agree and we affirm.

WILL A. IRWIN
Chief Administrative Judge

IRALINE G. BARNES
Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

[3] Concerning this issue, the ALJ wrote: "I can appreciate the position in which applicant finds itself. Hopefully matters of this type are thoroughly weighed before a notice of violation is issued or at least prior to a hearing. What can be considered here is the authority of OSM to issue the notice of violation and whether or not it has proved the violations. Part 721—Federal Inspections (30 CFR) provides at Section 721.11(a) [*sic*] for inspections on a random basis and at Section 721.13 for inspection based on citizen requests (Tr. 45–48). Either section would authorize the inspection in this case while Part 722—Enforcement Procedures (30 CFR) justify [*sic*] the action taken under the facts." Decision at 4.

ZAPATA COAL CORP.

2 IBSMA 9

Decided *January 22, 1980*

Consolidated appeals from an order by Administrative Law Judge Tom M. Allen dated May 31, 1979, in Docket No. CH 9–101–R (IBSMA 79–20) dismissing an application for expedited review of a cessation order issued to Zapata Coal Corp. by the Office of Surface Mining Reclamation and Enforcement under the provisions of the Surface Mining Control and Reclamation Act of 1977 and from a decision by Judge Allen dated July 20, 1979, in Docket No. CH 9–86–R (IBSMA 79–32) vacating the cessation order for which Zapata had applied for review.

IBSMA 79–20 dismissed; IBSMA 79–32 reversed.

1. Surface Mining Control and Reclamation Act of 1977: Roads: Maintenance

A partially constructed access road, if used to facilitate mining operations, is a road for purposes of the initial regulatory program and therefore subject to the maintenance requirements of 30 CFR 717.17(j)(3)(i).

APPEARANCES: Marye L. Wright, Esq., Office of the Field Solicitor, Charleston, West Virginia, Shelley D.

Hayes, Esq., Office of the Solicitor, and Marcus P. McGraw, Esq., Assistant Solicitor for Enforcement, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement; and A. L. Emch, Esq., of Counsel to Jackson, Kelly, Holt, & O'Farrell, Charleston, West Virginia, for Zapata Coal Corp.

OPINION BY THE BOARD OF SURFACE MINING AND RECLAMATION APPEALS

FACTUAL AND PROCEDURAL BACKGROUND

On Mar. 14, 1979, an inspector for the Office of Surface Mining Reclamation and Enforcement (OSM), acting under the authority of sec. 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977 (Act),[1] issued to Zapata Coal Corp. (Zapata) a notice of violation alleging four separate violations of the Act and the initial program regulations at Zapata's Buffalo Mine No. 4 and prescribing periods for the abatement of each alleged violation. On May 4, another OSM inspector inspected the mine again and determined that two of the violations (No. 2 and No. 4 of the notice of violation) had not been abated. He issued a cessation order pursuant to sec. 521(a)(3) of the Act (30 U.S.C. § 1271(a)(3) (Supp. I 1977)) for those two violations.

On May 14, 1979, Zapata filed an application for temporary relief from the cessation order, and on May 18, 1979, Administrative Law Judge (ALJ) Tom M. Allen held a hearing on that application. At the hearing OSM objected to the proceeding because Zapata had not filed an application for review; OSM argued that that is a prerequisite to the consideration of an application for temporary relief. The ALJ rejected that position and proceeded with the hearing. At the conclusion of the hearing he granted temporary relief for 60 days from May 18, 1979, for violation No. 2 (of the cessation order) but denied it for violation No. 1.

On May 30, 1979, Zapata filed an application for expedited review of the cessation order. In an order dated May 31, 1979, the ALJ denied expedited review, citing 43 CFR 4.1181, which allows the filing of an application for expedited review of a cessation order only when temporary relief has not been granted. In pertinent part, the order reads, "Temporary relief having been granted, the applicant is not entitled to file a motion for expedited review and therefore said application for expedited review is dismissed." Zapata filed a notice of appeal with the Board from that order on June 7, 1979. The case was docketed as IBSMA 79-20 (Zapata I).

[1] 30 U.S.C. §§ 1201-1328 (Supp. I 1977).

Also on June 7, 1979, Zapata filed an application for review of the cessation order before the ALJ. He held a hearing on that application on June 14, 1979, and issued his decision on July 20, 1979. In that decision, he vacated the cessation order, having found there was no basis for the issuance of the underlying notice of violation with respect to the two alleged violations still in issue. OSM filed a notice of appeal from that decision on Aug. 17, 1979. The Board docketed that appeal as IBSMA 79-32 (Zapata II) and in an order dated Oct. 26, 1979, consolidated that appeal with IBSMA 79-20 and requested further briefing.

Those charges, contained in the original notice of violation, which underlay the cessation order, alleged noncompliance with the fill regulations in 30 CFR 717.14 and the road maintenance regulations in 30 CFR 717.17(j)(3)(i). Since its brief presented argument only on that portion of the ALJ's decision relating to the alleged road maintenance violation, OSM has effectively waived objection to the portion relating to the alleged fill violation.

The background to OSM's issuance of the notice of violation containing the alleged violations of the road maintenance regulations is as follows: In the summer of 1978, Zapata filed with the West Virginia Department of Natural Resources, Division of Reclamation, an application for an underground opening permit for its site. Within the area was a road used infrequently by a gas company for access to one of its facilities. Zapata's State permit application included a proposal to upgrade this mile-long road, because it also provided access to the "face-up" (the entry point of Zapata's proposed opening). The State authority issued the permit in September 1978, and Zapata worked on the road and the face-up until weather caused disruption of those activities in December. Zapata had not begun spring operations at the time of the OSM inspection in March 1979.

DISCUSSION

Having consolidated the appeals, the Board is of the opinion that issues raised in Zapata I are moot and therefore that appeal is dismissed.[2] The Board therefore turns to the issue, raised in Zapata II, of whether the access road was used to facilitate mining, thereby subjecting it to the maintenance requirements of 30 CFR 717.17(j)(3)(i). Zapata argues that the pre-existing access road, which was in use, was under construction pursuant to specifications in a State approved permit and thus should not be subject to the maintenance requirements of sec. 717.17(j)(3)(i). OSM argues that whether or not the road was

[2] The 60-day temporary relief order period has passed, and in a subsequent hearing on the merits, the ALJ decided the case in Zapata's favor. We suggest, however, that where a cessation order lists more than one violation, 43 CFR 4.1181 may not preclude expedited review of those violations for which temporary relief has not been granted.

"finished" according to the State permit is irrelevant. If Zapata used it to facilitate mining operations, then it was a "road" for purposes of the regulations and subject to the maintenance requirements. The ALJ in vacating the violation determined that the road was under construction, and that thus no violation existed under sec. 717.17(j)(3)(i). We disagree with his determination.

[1] The definition of "road" in 30 CFR 710.5 reads in part:

> *Roads* means *access* and haul roads constructed, *used*, reconstructed, improved, or maintained for use in surface coal mining and reclamation operations, including use by coal hauling vehicles leading to transfer, processing, or storage areas. The term includes any such road used and not graded to approximate original contour within 45 days of construction other than temporary roads used for topsoil removal and coal haulage roads within the pit area. [Italics added.]

There is evidence in the record that the road was used to facilitate work at the face-up and to construct a fill from material removed from the opening (Tr. I 30–33, 67–68, 71, 98–99, 117, 163).[3] There is further evidence in the record that four truck loads of coal (50–60 tons) had been removed from the face-up area (Tr. II 69–71). In removing this coal, Zapata had to pass over the access road. The issue of lack of maintenance was essentially not in dispute (Tr. I 53–54, 66, 72–73, 139).

We therefore conclude that in view of the activity conducted on the access road, and its condition, it fell within the regulatory definition of a road and was not maintained in accordance with sec. 717.17(j)(3)(i).[4]

The ALJ's decision on this question is reversed.

IRALINE G. BARNES
Administrative Judge

WILL A. IRWIN
Chief Administrative Judge

MELVIN J. MIRKIN
Administrative Judge

KIN-ARK CORP.

45 IBLA 159

Decided *January 23, 1980*

Appeal from the decision of the New Mexico State Office of the Bureau of Land Management rejecting preference right coal lease application NM 11916.

Vacated and remanded.

1. Administrative Procedure: Adjudication—Application and Entries: Valid Existing Rights—Coal Leases and Permits: Generally—Regulations: Applicability

Where the holder of a coal prospecting permit completes his exploration and applies for a preference right coal lease in

[3] "Tr. I" refers to the transcript of the hearing held on May 18, 1979. "Tr. II" refers to the transcript of the hearing held on June 14, 1979.

[4] Even if Zapata's activity could fairly be characterized as facilitating construction of a road pursuant to the State permit approved by the State, such State approval cannot operate to relieve Zapata of its obligations under the interim regulations. (*See* 30 CFR 710.11(a)(3); *Alabama By-Products Corp.*, 1 IBSMA 239, 243, 86 I.D. 446, 448 (1979).)

1973, the application must be adjudicated on the basis of the applicant's subsequent conformity with regulations amended in 1976 with retroactive effect. However, where the application is summarily rejected solely for the reason that the applicant's supplemental submission is "inadequate," without identifying the deficiency, the decision will be vacated and the case remanded for readjudication.

APPEARANCES: William F. Carr, Esq., Santa Fe, New Mexico, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

INTERIOR BOARD OF LAND APPEALS

On Dec. 1, 1970, the New Mexico State Office of the Bureau of Land Management (BLM), issued to Hoover H. Wright a 2-year coal prospecting permit for 2,880 acres in T. 24 N., R. 13 W., New Mexico principal meridian. After a 1-year extension Wright apparently had not completed his exploration program when he assigned the permit to Kin-Ark Corp. This assignment was approved by BLM on Jan. 15, 1973.

Kin-Ark, apparently hampered by a shortage of time remaining in the permit and unavailability of drilling equipment, nevertheless managed to complete the exploration and submit its application for a preference right coal lease on Nov. 29, 1973—one day prior to the expiration of the permit.

The imposition of a Secretarial moratorium on the issuance of coal leases and permits caused BLM to suspend action on the adjudication of Kin-Ark's lease application. *See Krueger* v. *Morton*, 539 F.2d 235 (D.C. Cir. 1976); *Hunter* v. *Morton*, 529 F.2d 645 (10th Cir. 1976). While the application was pending, Congress enacted the Federal Coal Leasing Amendments Act of 1975 (FCLAA), 90 Stat. 1083; 30 U.S.C. § 201(b) (1976). Meanwhile, the Department revised its regulations relating to coal leasing—43 CFR Part 3520—on May 7, 1976. One of the revised regulations, 43 CFR 3521.1–1(b), required applicants for preference right coal leases to support their applications by the submission of significantly more material and information than was required theretofore under the regulation in effect at the time Kin-Ark's application was filed, *i.e.*, 43 CFR 3521.1–1(b) (1973).

By its decision dated June 29, 1976, BLM called upon Kin-Ark to support its application with the additional "data and information" required by the revised regulation. Kin-Ark requested and was granted two extensions of time to make this submission. Certain information was then filed by Kin-Ark, although the record before us does not reveal exactly what it was, as it was transmitted to Geological Survey by BLM, and apparently retained there. However, a copy of BLM's transmittal memo, dated Sept. 6, 1977, states:

> **Enclosed is the information submitted by Kin-Arc [*sic*] Corporation in support of their coal preference right lease application NM 11916**

The information has been submitted in response to our June 29, 1976 Decision and as required by the attached Notice and regulations contained in Circular 2390.[1]

By decision of that same date (Sept. 6, 1977) BLM required Kin-Ark to submit, at its expense, "a certified abstract from a qualified abstractor, as to the presence of any mining claims (located prior to the date of issuance of the permit), embracing all or part of the public land area under the * * * permit," as required by Instruction Memorandum No. 77-410 dated Aug. 18, 1977, from the Acting Director, BLM. The record does not show that Kin-Ark submitted an abstract.

On Feb. 5, 1979, the Area Mining Supervisor, Geological Survey, wrote a memorandum to BLM's Chief of Lands and Minerals Operations, Santa Fe, which memo dealt with the status of the subject application in one terse, conclusory sentence, viz: "We have received the additional data for NM 11916 from you, but the data is still inadequate under the requirements for the initial showing published in 1976 for all preference right lease applications for coal."

Without inquiring as to how or why Survey considered that "the data is still inadequate" BLM issued a decision on May 3, 1979, rejecting Kin-Ark's preference right lease application, giving as its sole reason for so doing that the data furnished by Kin-Ark in response to BLM's decision of June 29, 1976, "[H]as been examined and found to be inadequate" to meet the requirements of the 1976 amendment of 43 CFR 3521.1-1(b). Kin-Ark has appealed.

[1] We begin with the observation that notwithstanding any other aspect of the case, the rejection of the application solely for the reason that someone has said that it is "inadequate," without any specification of the nature of the deficiency or any consideration of whether the deficiency was fatal or remediable, major or insignificant, requires us to strike the decision down. There was no stated basis for the action; it left the appellant in ignorance of the reason for the rejection and unable to respond, and it provided this Board with nothing to adjudicate on appeal. Indeed, the initial decision cannot be characterized as the product of "adjudication," as it appears that its author had no more comprehension of what was supposedly wrong with the application than has been communicated to the rest of us. Such a decision must be treated as arbitrary and capricious. *See Charles E. Hinkle*, 40 IBLA 250 (1979); *Steven and Mary J. Lutz*, 39 IBLA 386 (1979). An appeal by one adversely affected by a decision is subject to dismissal if the appellant "fails to point out how the decision appealed from is in error" and how he "has improperly been deprived of some right." *Duncan Miller*, 41 IBLA 129 (1979). Therefore, unless the decision states a specific reason for the action taken,

[1] The circular referred to contains the revised regulations excerpted from Title 43, *Code of Federal Regulations*.

an appellant is usually left helpless to make an appeal on the merits of his application.

However, in this case appellant has chosen to ground its appeal on its assertion that it cannot be required to meet the requirements of the 1976 revised regulations, as it had already established its right to receive a lease as a matter of law by its alleged demonstration of a discovery of commercial coal in accordance with the requirements of the regulations in 1973.

As noted above, appellant had completed its approved program of exploration, asserted a discovery of commercial coal, and filed its application for a preference right coal lease on Nov. 29, 1973, prior to the expiration of the term of its prospecting permit. All of this was allegedly done in compliance with the requirements of the statute and regulations then in effect.

The statute, 30 U.S.C. § 201(b) (1970), provided:

> Where prospecting or exploratory work is necessary to determine the existence or workability of coal deposits in any unclaimed, undeveloped area, the Secretary of the Interior *may issue*, to applicants qualified under this chapter, prospecting permits for a term of two years, for not exceeding five thousand one hundred and twenty acres; and *if within said periods of two years thereafter the permittee shows to the Secretary that the land contains coal in commercial quantities, the permittee shall be entitled to a lease under this chapter for all or part of the land in his permit.* [Italics added.]

This language invested the Secretary with the authority to grant or refuse a prospecting permit at discretion, "may issue" being the operative verb phrase. However, once the permit was issued, the Secretarial discretion afforded by the statute was fully and finally exercised. Thereafter, the right of the permittee to receive a lease was controlled by his success in demonstrating to the Secretary that the land contained coal in commercial quantities. If he did so, that statute declared, "[T]he permittee shall be entitled to a lease * * *." The Department has long taken the position that, notwithstanding its use of the term "preference right lease," the Secretary has no discretionary power under the statute to refuse to grant the lease, and the applicant who meets all the statutory and regulatory requirements becomes entitled to a lease of the discovered deposit as a matter of law. *J & P Corp.*, 13 IBLA, 83 (1973); *Peter I. Wold*, II, 13 IBLA 63, 80 I.D. 623 (1973); *Emil Usibelli*, 60 I.D. 515 (1951); *Leonard E. Hinkley*, A-26187 (June 12, 1951). In fact, it appears that in years past the Department's recognition of the absolute right of a successful prospecting permittee to the coal which he had discovered was even more clearly viewed than recently. In *Emil Usibelli*, *supra*, the Solicitor of this Department held:

> Where the holder of a coal prospecting permit, as the result of prospecting work done on the land covered by the permit, has demonstrated

that the land contains coal in commercial quantities and has submitted an application for established policy of the Department permits the applicant to begin the commercial mining of coal from the land without awaiting the actual issuance of a lease to him. [60 I.D. 516.]

While it can no longer be said that this represents Departmental policy, due to environmental and other considerations, the rule of law emphasized by *Usibelli* and the other decisions cited remains unaltered. *N.R.D.C.* v. *Berklund*, 458 F. Supp. 925 (D.D.C. 1978), *aff'd*, Civ. No. 78-1757 (D.C. Cir. Nov. 9, 1979). *See* discussion and notes, Fairfax and Andrews, *Debate Within and Debate Without*, 19 Natural Resources Journal 505, 519-22 (1979).

The question remaining, then, is whether a permittee who has completed his exploration, allegedly discovered commercial coal, timely filed his application for a lease, and supported that application with the showings required by regulation in 1973, can have that application rejected for failure to meet the more onerous requirements imposed by the 1976 revision of that regulation. We answer in the affirmative.

Kin-Ark argues that as it was entitled to a lease as a matter of legal right in 1973, it should not be divested of that right by the promulgation of a subsequent regulation which is applied by BLM with retroactive effect. Indeed, appellant argues with considerable force that because the Congress empowered the Secretary to adopt general regulations to implement the leasing provisions of the basic Act (30 U.S.C. § 201(a) (1970)), the newly promulgated regulations are legislative in character. It is maintained that the general rule concerning the retroactive application of administrative regulations includes the power to give them retroactive effect, provided they do not conflict with restrictions on legislative power relating to retroactive laws, such as, for instance, the disturbance of vested rights, citing 2 Am. Jur. 2d, *Administrative Law* § 308 (1962).

"An administrative regulation, especially one which has the effect of creating an obligation, cannot be construed to operate retroactively *unless the intention to that effect unequivocally appears.*" *Miller* v. *United States*, 294 U.S. 435, 439 (1935), *reh. denied*, 294 U.S. 734 (1935). As they now appear in the *Code of Federal Regulations* there is no "unequivocal" manifestation of any intent to make the revision of 43 CFR Groups 3400 and 3500 regulations retroactive, but when published as proposed rulemaking and again upon final rulemaking, such an intention was clearly stated. On Jan. 19, 1976, when the revision of the subject regulations was published in the *Federal Register* as proposed rulemaking, the Department stated at 41 FR 2648 (Jan. 19, 1976): "If adopted, the Department will apply the proposed regulations to all pending and future applications for leases by prospecting permittees, but will not reexamine leases that were issued prior to the effective date of these regulations."

On May 7, 1976, when the revision of 43 CFR 3521.1–1 was published as final rulemaking, the regulation was preceded by a description of comments received following the publication of the proposed revision, and the Department's reaction or response to each. The general tenor of this discussion indicates in several places that it was contemplated that the revised regulations would apply to preference right lease applications which were then pending, but, in addition, this issue was addressed directly and specifically at 41 FR 18845 (May 7, 1976), viz:

> 3. Request that this standard not apply to permits granted before the effective date of the regulation. 3520.1–1(d). This section stated that the regulations would apply to applications for leases pending on the effective date of this regulation. The Department has full legal authority to adjudicate pending applications for leases under the standards adopted by these regulations. As a question of policy, it has determined that the public interest would not be fully protected unless these applications for leases are examined under what the Department believes is the correct interpretation of the statute.

Thus, there can be no gainsaying that appellant had clear constructive notice that the revised regulation(s) would be applied to its then pending lease application.

Appellant also argues that since it had established its legal entitlement to receive a lease pursuant to the regulatory criteria existing in 1973, that right cannot be defeated by the more demanding criteria of the 1976 revised regulation, because the Federal Coal Leasing Amendments Act of 1975, *supra*, specifically provides that its amendment of sec. 2(b) of the Mineral Lands Leasing Act (30 U.S.C. § 201(b) (1976)) is "subject to valid existing rights." Therefore, says appellant, the revision of 43 CFR 3521.1, having been promulgated to implement the Federal Coal Leasing Amendments Act, cannot do what the Act expressly prohibits, *i.e.*, adversely affect its pre-existing entitlement to a lease. However, this argument suffers a fallacious premise. The 1976 revision of the coal leasing regulations was *not* done to implement The Coal Leasing Amendments Act but, rather, these revisions were promulgated pursuant to the authority of "the Mineral Leasing Act of 1920; as amended and supplemented 30 U.S.C. 181–287," (*sic*) "under section 402, Reorganization Plan No. 3, 60 Stat. 1009," and the "National Environmental Policy Act of 1969 (NEPA) 42 U.S.C. 4321–35." *See* 42 FR 2648 (Jan. 19, 1976). In fact, the "Federal Coal Lease Amendment Act of 1975" was not enacted into law until Aug. 4, 1976, some 3 months *after* the promulgation of the revised regulations as final rulemaking.[2]

The saving clause in the Federal Coal Leasing Amendments Act which preserves "valid existing rights" undoubtedly encompasses appellant's then pending application for a preference right lease, so that nothing in that Act could affect appellant's right to receive a

[2] Subsequently, the Congress, in recognition of the date of the Act, formally changed its title to the "Federal Coal Leasing Amendments Act of 1976." Sec. 8, P.L. 95–554, 92 Stat. 2075 (1978).

lease. But nothing in that Act, or in any regulation promulgated to implement that Act, *has* adversely affected appellant's right to receive its lease. As the Act eliminated the prospecting permit/preference right mechanism for acquiring a coal lease, the clause exempting those with "valid existing rights" merely made it possible for pending applicants to receive preference right leases thereafter *if* they showed themselves to be qualified. The Department, in revising 43 CFR 3521.1, was engaged in defining the showing that would be necessary to demonstrate such qualification. Since under the then pending legislative amendment there would be no *new* preference right lease applicants, the revision could only apply to those who fell within the definition of the "valid existing rights" provision recited in the Federal Coal Lease Amendments bill. Thus, the revision of the regulation was accomplished in full anticipation that "valid existing rights" would be preserved by the Act, rather than in disregard of that provision in the bill then pending.[3]

The amended regulations were intended, *inter alia*, to properly define the statutory reference to "commercial quantities," and to meet the enhanced responsibility of the Department with regard to environmental concerns. The propriety of and necessity for such action was articulated in *Utah International Inc.* v. *Andrus*, Civ. No. C77-0225 (D. Utah CD June 15, 1979). *See Global Exploration & Development Corp.* v. *Andrus*, Civ. No. 78-0642 (D.D.C. Aug. 14, 1978).

We conclude that appellant is obliged to make the submissions required by the amended regulations in order to "show to the Secretary" that its alleged discovery of coal is such as will qualify it to receive a lease with terms and conditions appropriate to other public interest considerations.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and the case remanded for readjudication.

EDWARD W. STUEBING
Administrative Judge

WE CONCUR:

JAMES L. BURSKI
Administrative Judge

DOUGLAS E. HENRIQUES
Administrative Judge

[3] The Department was justified in this anticipation by the Senate Committee Report published July 23, 1975, which included the following:

"Section 102 also adds a new subsection 2(c) to the 1920 Act which gives express authority for coal exploration permits.

"The Commitee wishes to stress that the repeal of a Subsection 2(b) is expressly 'subject to valid existing rights' and thus is not intended to affect any valid prospecting permit outstanding at the time of enactment of the amendments. Any applications for preference right leases based on such permits could be adjudicated on their merits and preference right leases issued *if the requirements of Subsection 2(b) of the 1920 Act and other applicable law, such as the National Environmental Policy Act of 1969, were met.*" (Italics added.) S. Rep. No. 94-296, 94th Cong., 1st Sess. 7 (1975).

CITY OF ANCHORAGE, ALASKA, & JACK G. FISHER, ET AL., A.K.A. CONCERNED CHUGACH CITIZENS V. CHUGACH ELECTRIC ASS'N, INC.

45 IBLA 171

Decided *January 30, 1980*

Appeal from a decision of the Alaska State Office, Bureau of Land Management, dated Apr. 16, 1979, approving right-of-way Alternative K for the alignment of Chugach Electric Association's 230-kV transmission line.

Affirmed.

1. National Environmental Policy Act of 1969: Generally—Federal Land Policy and Management Act of 1976: Rights-of-Way—Rights-of-Way: Generally—Rights-of-Way: Federal Land Policy and Management Act of 1976

Public Land Order No. 2676 (1962), requires the approval of an authorized officer of the Department of the Army before the Secretary of the Interior can grant a right-of-way over lands subject to the public land order. The Department of the Interior has no authority to grant a right-of-way where the approval is withheld.

2. Rights-of-Way: Generally

In reviewing a decision to grant a right-of-way based upon an environmental analysis report, the decision will be upheld where the record evidences consideration of all available information and a reasoned analysis of the factors involved, made in due regard for the public interest.

APPEARANCES: Olaf K. Hellen, Esq., Anchorage, Alaska, for City of Anchorage and Concerned Chugach Citizens; Carl J. D. Bauman, Esq., Anchorage, Alaska, for Chugach Electric Association; Russell L. Winner, Esq., Office of the Regional Solicitor, Anchorage, Alaska, for BLM.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

INTERIOR BOARD OF LAND APPEALS

The city of Anchorage, Alaska, and a group of individuals, styling themselves Concerned Chugach Citizens,[1] appeal from a decision of the Alaska State Office, Bureau of Land Management (BLM), approving right-of-way Alternative K for the alignment of Chugach Electric Association's (CEA) 230-kV electric transmission line.

The 18-mile transmission line is part of a large project funded by a Rural Electrification Administration (REA) loan. The REA determined that the loan involved "major Federal action" requiring an environmental impact statement (EIS). An environmental analysis prepared by a consulting firm retained by CEA was incorporated into the REA prepared EIS.

On Jan. 9, 1978, CEA applied to BLM for a right-of-way grant for the portion of the transmission line

[1] The individual named appellants who comprise the group calling itself Concerned Chugach Citizens are Jack G. Fisher, Nancy Fisher, Kenneth R. Harper, Susan Harper, Patrick A. Stanfield, and Richard R. Thiel.

scheduled to cross Federal lands. BLM prepared an environmental assessment record (EAR) to supplement the other environmental documents.

The EAR studies 11 alternative routes for the transmission line in addition to the route proposed by CEA. The EAR concentrated on a 1-mile section of the right-of-way that did not utilize existing rights-of-way and involved the border between the eastern boundary of the Chugach Foothills and Pleasant Valley subdivisions of Anchorage and a portion of the western boundary of Fort Richardson military reservation. The selection process generated considerable public response, particularly from the citizens whose homes border Fort Richardson.

As the evaluation process progressed, the Army announced that Alternatives designated "A" and "B" intruded too far into the Army reservation and would interfere with their training exercises. At that time the military indicated that it would not oppose a right-of-way located 300 feet from the western boundary of the reservation. The proposed right-of-way located 300 feet inside Fort Richardson became Alternative K, the route ultimately approved in the Decision Record/Rationale.

The Decision Record/Rationale of Apr. 16, 1979, signed by Curtis McVee, Alaska State Director, states:

Decision:

I approve Alternative K for the alignment of Chugach Electric Association's (CEA) request for a 230-KV transmission line right-of-way from Knik Arm to University substation.

Rationale:

The EAR and the Land Report for this project analyze the proposed action and the eleven alternatives developed for consideration. The reasons that I have approved Alternative K are:

1. it is more cost effective than the underground alternatives and has little cost difference from the parallel above-ground alternatives;

2. it is more reliable than underground alternatives when one considers that high voltage underground installations are untried and unproven in Alaskan frost conditions and that delays in repairing such underground circuits can take up to two weeks or longer;

3. it impacts the least number of residences and it allows future expansion of the right-of-way without conflicts with residential housing, by providing a buffer of natural vegetation between the power line and the housing area which directly borders the military reservation;

4. it would conform with plans for the East City Bypass and not conflict with the Far North Bicentennial Park Plan;

5. it will insure that the military can continue its training operations in an uninterrupted manner. The Regional Solicitor has determined that this office has no authority to permit land use on the military withdrawal without concurrence by the Department of the Army.

The Rural Electrification Administration, U.S. Department of Agriculture, has prepared an Environmental Impact Statement on CEA's proposal for upgrading its electric transmission system (Beluga Station No. 7 and No. 8, Bernice Luke Power Plant Unit No. 3, 230-KV Transmission Additions, January, 1978). The Environmental Assessment Record (EAR-010-8157), which BLM has prepared, supplements this EIS in areas which the U.S. Department of Interior felt were not fully analyzed. Therefore, I do not feel another EIS is necessary

Alternative K, including all mitigation measures which were recommended in the EAR, is approved.

Appellants argue that BLM's decision, based upon the various reports, is a violation of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321–4335 (1976), and the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701–1781 (1976).

Appellants' objection to the selection of Alternative K over Alternative B is primarily aesthetic.[2] The transmission line following Alternative K will impair the view from the houses in the subdivisions of the Chugach Mountains to a greater extent than if Alternative B were used.

The BLM decision approving Alternative K as the route of the transmission line is challenged by appellants on numerous specific grounds. Appellants most substantial arguments are: 1) BLM should have attempted to have Public Land Order (PLO) No. 2676 modified to negate the military's opposition or alternatively, the rationale of the military's opposition to Alternative B should have been further analyzed and reviewed by BLM to reflect the reasons for the military's opposition; 2) Alternative K should not have been chosen because it is inconsistent with the Anchorage Metropolitan Area Transportation Study (AMATS); and, 3) The selection of Alternative K results from the inadequate weighing of alternatives, a failure to consider all available information, a failure to properly analyze the factors involved, and a disregard for public interest.

[1] Pursuant to PLO 2676 (May 4, 1962) the land in question was again placed under the jurisdiction of the Department of the Army.[3] The Authority to grant rights-of-way over the land

[2] Appellants had argued earlier that Alternative K posed a greater danger to nearby residents and to their property than did Alternative B. This argument was essentially abandoned at oral argument.

[3] The land was temporarily withdrawn and placed under the control and jurisdiction of the War Department for use as a military reservation pursuant to Exec. Order No. 8102 (Apr. 29, 1939). Exec. Order No. 9526 (Feb. 28, 1945) amended Exec. Order No. 8102 to return jurisdiction to the Department of the Interior 6 months after termination of the national emergency. On May 4, 1962, PLO 2676 transferred jurisdiction back to the Army. PLO 2676 provides:

"ALASKA

"Amending Certain Orders Which Withdrew Lands for Use of the War Department for Military Purposes

"By virtue of the authority vested in the President, and pursuant to Executive Order No. 10355 of May 26, 1952, it is ordered as follows:

"1. Executive Orders No. 8102 of April 29, 1939; No. 8343 of February 10, 1940; No. 8755 of May 16, 1941; No. 8847 of August 8, 1941, and Public Land Orders No. 47 of October 12, 1942, and No. 93 of March 12, 1943, which withdrew public lands in Alaska for use of the War Department for military purposes, are hereby amended to the extent necessary to delete therefrom the following paragraph included therein, or added thereto by Executive Order No. 9526 of February 28, 1945, or Public Land Order No. 284 of June 12, 1945:

" 'The jurisdiction granted by this order shall cease at the expiration of the six months' period following the termination of the unlimited national emergency declared by Proclamation No. 2487 of May 27, 1941 (55 Stat. 1647). Thereupon, jurisdiction over the lands hereby reserved shall be vested in the Department of the Interior, and any other department or agency of the Federal Government according to their respective interests then of

Continued on page 24.

remained with the Secretary of the Interior with the limitation that no grants would be made without the approval of an authorized officer of the Department of the Army.

Sec. 204(i) of FLPMA, 43 U.S.C. § 1714(i) (1976) restricts the Secretary of the Interior's authority to modify or revoke withdrawals. Sec. 204(i) provides: "In the case of lands under the administration of any department or agency other than the Department of the Interior, the Secretary shall make, modify, and revoke withdrawals only with the consent of the head of the department or agency concerned, except when the provisions of subsection (e) of this section apply."

Subsection (e) provides that the Secretary of the Interior may make an emergency withdrawal when he determines "that an emergency situation exists and that extraordinary measures must be taken to preserve values that would otherwise be lost."

We note that sec. 204(e) is not, by its terms, specifically applicable to the revocation or modification of withdrawals as opposed to their formulation. Assuming without deciding that subsection (e) would be applicable to revocation of a withdrawal, appellants have not argued nor does the case record disclose that the military's objection to Alternative B has created such an emergency situation. Thus, under either theory, sec. 204(i) of FLPMA prevents the Secretary from modifying PLO 2676 to override the military's objection to Alternative B.

Appellants have also argued that BLM had an affirmative duty both to independently evaluate the basis for the military's objection and, if unconvinced of the merits of the Army's concerns, to endeavor to change the military's decision. While this Board is not unmindful of the Department's obligation under numerous statutes to safeguard the environment to as great an extent as possible, we also recognize that:

> There is reason for concluding that NEPA was not meant to require detailed discussion of the environmental effects of "alternatives" put forward in comments when these effects cannot be readily ascertained and the alternatives are deemed only remote and speculative possibilities, *in view of basic changes required in statutes and policies of other agencies—making them available, if at*

Continued from page 23.

record. The lands, however, shall remain withdrawn from appropriation as herein provided until otherwise ordered.'

"2. The orders of withdrawal referred to in paragraph 1, above, are hereby further amended by substituting the words 'Department of the Army' for the words 'War Department' wherever they appear.

"3. The Department of the Interior shall retain jurisdiction of the mineral and vegetative resources of the lands.

"4. The Department of the Army may issue permits revocable at will for authorized use of the lands included in this order; but authority to change the use specified by this order or to grant rights to others to use the lands, including grants of leases, licenses, easements and rights-of-way is reserved to the Secretary of the Interior or his authorized delegate, provided that no grants will be made under this authority without the approval of an authorized officer of the Department of the Army.

"John A. Carver, Jr.,

"Assistant Secretary of the Interior.

"May 4, 1962.

"[F.R. Doc. 62-4581; Filed, May 10, 1962; 8:46 a.m.]"

all, only after protracted debate and litigation not meaningfully compatible with the time-frame of the needs to which the underlying proposal is addressed. [Italics supplied.]

Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519, 551 (1978), *citing NRDC* v. *Morton*, 458 F.2d 827, 837–38 (1972).

While situations might arise in which BLM might be required to attempt to alter the view of a sister agency, such a situation is not disclosed by the facts of this appeal. Such necessity might arise where the only environmentally or economically feasible alternative for a needed project crosses or encroaches upon land which is under the jurisdiction of another agency, and the local official of that agency has, with no discernible justification, refused consent. It would also have to be shown that all other alternatives result in grave environmental or economic depredations. In such a circumstance, BLM might well be required to undertake to have the local official's decision reversed. For a number of reasons, such is not the situation disclosed herein.

First, while Alternative K may have a greater aesthetic impact upon appellants, it can clearly not be said to be totally environmentally unacceptable. Moreover, while appellants argued that BLM is obligated under NEPA to choose the alternative which has the least environmental impact, the Supreme Court has recently addressed this precise question. In *Strycker's Bay Neighborhood Council, Inc.* v. *Karlen*, 48 L.W. 3433 (Jan. 8, 1980), the Court, in a per curiam decision, stated:

> Vermont Yankee [*supra*] cuts sharply against the Court of Appeals' conclusion that an agency, in selecting a course of action, must elevate environmental concerns over other appropriate considerations. On the contrary, once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot "interject itself within the area of discretion of the executive as to the choice of the action to be taken."

48 L.W. at 3434. While this Board, as the Secretary's agent, can exercise executive discretion, the Court's decision clearly stands for the proposition that considerations other than environmental impacts are properly weighed in the decisionmaking process.

[2] From our review of the EAR it is clear that BLM not only obtained sufficient information to satisfy sec. 204(e), but also adequately reviewed the Army's reasons for its opposition to Alternative B.

The Army did not directly supply BLM with all of the documentation supporting its opposition to Alternative B. A portion of the information was ultimately released by the Army to Senator Stevens' office and eventually provided to BLM and included in the final

EAR. Both the Army's lack of consent and the reason for this opposition are mentioned in the decision rationale.

Appellants contend that the selection of Alternative K is inconsistent with a potential freeway route proposed by AMATS. Appellants' major concern is that when and if the freeway is built it will be routed between their homes and the routing of Alternative K. The EAR recognizes that such a routing is possible but concludes that the more probable placement will locate the freeway further from the homes than the power line, preserving the desired buffer zone.

The freeway under consideration by AMATS is only a proposal. A determination has not been made as to the exact location of the freeway. While BLM could have been faulted for totally ignoring the freeway study, in light of the speculative nature of the freeway, sufficient attention was given the proposal in the EAR. *See County of Suffolk* v. *Secretary of the Interior*, 562 F.2d 1368 (2nd Cir. 1977), *cert. denied*, 434 U.S. 1064, 98 S. Ct. 1238 (1978).

Appellants generally challenge the adequacy of the EAR and are critical of the decision process that led to the selection of Alternative K.

On arriving at its decision, BLM must consider all available information. The record must evidence a reasoned analysis of the factors involved made in due regard for the public interest. The decision will be upheld unless appellants can show sufficient reason to change the result. *Dean W. Rowell*, 37 IBLA 387 (1978); *Robert L. Healy*, 35 IBLA 66 (1978); *Broken H Ranch Co.*, 34 IBLA 182 (1978).

We are not persuaded that sufficient reason exists to change the result. The EAR adequately considers the maintenance and operating units of the proposal and the alternatives. The environmental consequences including the impact upon the air, land, water, plants, animals, and human values were thoroughly considered by BLM and are reflected in the Decision/Record Rationale. BLM made a special effort to take into account the viewpoints and concerns of both the immediate residents and the Muncipality of Anchorage.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

FREDERICK FISHMAN
Administrative Judge

WE CONCUR:

JAMES L. BURSKI
Administrative Judge

DOUGLAS E. HENRIQUES
Administrative Judge

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